A

RE FRANCIS PHILLIPS AJ PHILLIPS; EX P BANK PERUSAHAAN KECIL & SEDERHANA MALAYSIA BHD

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
B [BANKRUPTCY NO: D8-29-989-2004]
21 APRIL 2008

BANKRUPTCY: *Notice - Validity - Request for issue of notice - Whether may be made by judgment creditor himself or by his solicitor - Solicitor an agent*
C *of corporation - Whether sufficiently competent to do so - Bankruptcy Act 1967, s. 133 - Bankruptcy Rules 1969, r. 215, Form 4*

This was an appeal by the judgment debtor against the decision of the Senior Assistant Registrar in dismissing the judgment debtor's application
D to set aside the bankruptcy notice. According to the judgment debtor, the request to issue the bankruptcy notice by the judgment creditor was in breach of r. 215 of the Bankruptcy Rules 1969 and s. 133 of the Bankruptcy Act 1967. The judgment debtor submitted that the request under Form 4 of the bankruptcy notice was made by the judgment creditor company and signed by the solicitor for the judgment creditor
E when it should have been made by the officer of the company and signed by him. The judgment creditor opposed this appeal by contending that Form 4 allowed the judgment creditor or the solicitor to sign Form 4 as a solicitor is an agent of a corporation.

F **Held (dismissing the appeal):**

(1) The Senior Assistant Registrar was right in dismissing the judgment debtor's application to set aside the bankruptcy notice. The request for the issuance of a bankruptcy notice may be made by the judgment creditor himself or by his solicitor. The request for the
G issuance of the bankruptcy notice in Form 4 was made by the solicitor for the judgment creditor who had signed the form in his capacity as the solicitor for the judgment creditor. A solicitor is an agent of a corporation, and should under the circumstances be sufficiently competent to make the request for the issuance of the
H bankruptcy notice. (paras 4, 5 & 6)

Case(s) referred to:

Development & Commercial Bank Bhd v. Datuk Ong Kian Seng [1995] 3 CLJ 307 FC ***(refd)***

Re Chen Sing Chew Ex-parte Oriental Tin Smelters Sdn Bhd [1974] 1 LNS 131 HC
I ***(refd)***

Rengasamy Pillai v. Comptroller of Income Tax [1970] 1 LNS 139 PC ***(refd)***

Timbunan Alam Development Sdn Bhd v. Platicorp Holding (M) Sdn Bhd [2000] 5 CLJ 470 HC ***(foll)***

UMW Industries (1985) Sdn Bhd v. Lim Chee Hian [2005] 1 CLJ 173 CA ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, ss. 131, 133
Bankruptcy Rules 1969, rr. 92, 215

For the judgment creditor - Roszimah Jamrus; M/s Tengku Mohamed & Alan Lim
For the judgment debtor - CS Murtti; M/s Sundra Murtti & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Kang Hwee Gee J:

[1] This is an appeal by the judgment debtor against the decision of the Senior Assistant Registrar in dismissing the judgment debtor's application to set aside the bankruptcy notice on the following grounds:

i. The issue raised before the Senior Assistant Registrar is pertaining to r. 215 of the Bankruptcy Rules 1969 and s. 133 of the Bankruptcy Act 1967.

Rule 215 reads as follows:

> 215. Officer of corporation, etc.
>
> Where a corporation presents a petition or takes any other action under this Act, this officer of the corporation may act in his own name, stating that he is such officer duly authorised under seal; but a petition may be presented by the corporation, and signed by the officer on its behalf. Any person chosen by the corporation to act for it as agent, is an "officer" within section 133, and if duly authorised under seal can act for the corporation.

Section 133 reads as follows:

> 133. Acts of corporations, firms and mentally disordered persons.
>
> For all or any of the purposes of this Act:
>
> (a) a corporation may act by any of its officers authorized in that behalf under the seal of the corporation;
>
> (b) a firm may act by any of its members;
>
> (c) a mentally disordered person or lunatic may act by his committee or *curator bonis*.

ii. The request to issue the bankruptcy notice by the judgment creditor was in breach of r. 215 and s. 133. The request under Form 4 of the bankruptcy notice was made by the judgment creditor company itself and signed by the solicitor for the judgment creditor. The said request should have been made by the officer of the company and signed by him. In this case it is clear that the request was made by the judgment creditor company and signed by the solicitor. See *UMW Industries (1985) Sdn Bhd v. Lim Chee Hian* [2005] 1 CLJ 173 per Mokhtar Sidin JCA at 183:

> First of all, the above request was made by the appellant (the corporation) and not by any officer of the company. Though there was a signature above the name of the company, it is a signature of an unknown person. No evidence was given by the appellant as to whose signature appeared above the name of the appellant. There is no evidence to show that the signature is the signature of Mr Siew Weng Leong. If it is, then he would be acting outside his authority. As can be seen, the request was made on October 9, 1989 while Mr Siew Weng Leong got his authority only on September 21, 1990. Looking at the request, we are of the view that the request was made by the appellant as a company and not made by an authorized officer or by any officer because no name of the officer appeared anywhere in the request. This is in direct contravention of rule 215 of the Bankruptcy Rules.
>
> The appellant contended that the solicitors could act on behalf of the appellant to make the request. The respondent conceded to this and indeed the law permits such a request being made by solicitors on behalf of a company which in this case is the appellant. But the respondent disputed that the request was made by the solicitors for the appellant. Looking at the request, it is clear to us that though the name of the solicitors appeared in the request, the request was not made by the solicitors. As we have stated earlier, the request was made by the appellant themselves and the name of the solicitors appeared only as a notification that they are the solicitors for the appellant. In our view, the request was not made by the solicitors.

iii. Now see the actual Form 4 itself in encl. 2. It is clear that the company itself requested for the issuance of the notice but it was signed by the solicitor.

[2] The appeal is opposed by the judgment creditor on the following grounds:

i. Form 4 allows the judgment creditor or the solicitor to sign Form 4. A solicitor is an agent of a corporation. See *Timbunan Alam Development Sdn Bhd v. Platicorp Holding (M) Sdn Bhd* [2000] 5 CLJ 470 per Rekhraj J at 473-474:

It is a trite law, that a corporation can only be represented in court by its agent; who must be an authorized person to act on the instructions of the company; and in that capacity to bring or defend the actions; provided when bringing such actions, clear identity of his capacity is disclosed in bringing the action for and on behalf of the company; and which the solicitors M/s FY Poh & Co have correctly done by signing the petition as such on behalf of the company.

In support of this argument, I refer to s. 194 of the Companies Act 1965 – on the interpretation of the word 'officer or agent' in relation to corporation, includes an advocate; and with it, because of the fused system of the legal profession in our country, to mean a 'solicitor' as being the person appointed by the corporation to do all such acts or things for and on behalf of the company.

The call of the respondents solicitors on the format to be signed by the petitioner is a call in futility; as the non-signing by the petitioner of the petition personally, does not and has not in any way shown to have caused any prejudice, or substantial injustice to the respondent; and the court upon being so satisfied, held that such non-signing was only an irregularity, curable under r. 194(1) of the Companies (Winding-Up) Rules 1972 which states:

> No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the court is of the opinion that substantial injustice has been caused by the defect or irregularity; and that the injustice cannot be remedied by any order of the court.

I am satisfied that the petition as presented is properly signed by its authorised agent of the company, under the hand of its solicitors acting for and on behalf of the company, and their signing as such has not caused any injustice or prejudice to the respondent.

ii. The UMW Industries case referred to by the judgment debtor is based on the decision of *Re Chen Sing Chew Ex-parte Oriental Tin Smelters Sdn Bhd* [1974] 1 LNS 131, which pertains to a petition for bankruptcy and not a request to issue the bankruptcy notice under r. 92 of the Bankruptcy Rules. In *Re Chen Sing Chew* the petition was signed by an officer who was not authorized to sign the petition at that time and who was only authorised subsequently to sign the petition after it had been presented.

iii. In any case even if there is defect in Form 4 this is curable under s. 131 of the Bankruptcy Act 1967. See *Development & Commercial Bank Bhd v. Datuk Ong Kian Seng* [1995] 3 CLJ 307 a decision of the Federal Court per Mohamed Dzaiddin FCJ at 314-315:

> Lord Diplock, delivering the judgment of the Privy Council in *Rengasamy Pillai v. Comptroller of Income Tax* [1970] 1 MLJ 233 PC, drew a distinction between a defect which renders the bankruptcy proceedings a nullity and a mere formal defect or irregularity in the following words (at p. 236):
>
> > But there is relevant authority upon the construction of the identical words in s. 147(1) of the English Bankruptcy Act 1914. It is implicit in the section that proceedings in bankruptcy may be so defective as to render them a nullity notwithstanding that no substantial and irremedial injustice has in fact been caused by the defect. The section draws a distinction between such a defect and a 'formal defect or irregularity'. It is only the latter which are validated by the section, provided that no substantial and irremedial injustice has been caused.
> >
> > What then is 'a formal defect or irregularity' within the meaning of the section? This was discussed in relation to a bankruptcy notice in *In re a Debtor ex p The Debtor v. Bowmaker Ltd* [1951] 1 Ch 313 in which the earlier authorities were considered. The test there laid down was whether the defect in the notice was of such a kind as could reasonably mislead a debtor upon whom it was served. If it was, the notice was not validated by the section notwithstanding that the particular debtor upon whom it was served was not in fact misled. If on the other hand it could not reasonably mislead the debtor it was a formal defect and validated by the section. *Their Lordships are here only concerned with the application of the section to a bankruptcy notice. They are not concerned with whether the same test is appropriate to determine the validity of subsequent steps in bankruptcy proceedings. In their view any failure to comply with the statutory provisions as to the form of a bankruptcy notice of a kind which could not reasonably mislead a debtor upon whom it is served is a 'formal defect' and validated by the section.* (emphasis added)

Findings And Decision

[3] The Senior Assistant Registrar was right in dismissing the judgment debtor's application to set aside the bankruptcy notice.

[4] Having had a look at Form 4 with some degree of circumspection, I am convinced that the request for the issuance of a bankruptcy notice may be made by the judgment creditor himself or by his solicitor.

[5] In this instance, it is clear that the request for the issuance of the bankruptcy notice Form 4 was made by the solicitor for the judgment creditor who had signed the form in his capacity as the solicitor for the judgment creditor. This is certainly not a case where the judgment creditor had made the request for the issuance of the bankruptcy notice on the one hand and its solicitor had signed the form on the other (as counsel for the judgment debtor had submitted).

[6] I would agree entirely with the judgment of Rekhraj J in *Timbunan Alam*, *supra* that a solicitor is an agent of a corporation, and should under the circumstances be sufficiently competent to make the request for the issuance of the bankruptcy notice.

[7] The Court of Appeal case of *UMW Industries*, *supra* did not decide on the issue of whether a solicitor can act as an agent of judgment creditor to request the issuance of a bankruptcy notice under Form 4. Rather the *ratio* in that case is concerned with the issue of whether an officer of the company UMW Industries who was not so authorised at the time when he made the request for the issuance of the bankruptcy notice, had acted legally in making that request in Form 4.

[8] But even assuming that Form 4 may have been irregularly issued this does not necessarily mean that it cannot be condoned under r. 215 of the Bankruptcy Rules 1969. As counsel for the judgment creditor Cik Roszimah has rightly submitted the test to be applied whether the defect in the notice was curable depends on whether it could reasonably mislead the judgment debtor as to the intent of the judgment creditor to institute a bankruptcy petition against him following the ratio in the Privy Council decision in *Rengasamy Pillai v. Comptroller of Income Tax* [1970] 1 LNS 139. It goes without saying that in this instance the bankruptcy notice that had been issued and subsequently served on the judgment debtor could not have misled the judgment debtor to believe that a bankruptcy petition would be forthcoming should he fail to comply with the bankruptcy notice.

[9] The appeal is dismissed with costs.